FILED
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RICHARD W. WIEKING
CLERK U.S. DISTRICT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. ASCARRUNZ Plaintiff v.	)	No C960625VRW
	)	ORDER
BECHTEL POWER CORP. Defendant	)	

Defendant Bechtel Power Corp (Bechtel) Employed plaintiff Miguel A. Ascarrunz from July 1967 until April 1993 as a designer of electrical systems. At the conclusion of the employment-relationship, plaintiff held the position of grade 26 supervising designer at defendant's regional office in Gaithersburg, Maryland.

The pleading indicate that plaintiff returned from a short-term disability leave in October 1992 and was assigned to the "MassPower project". In January 1993, plaintiff was reassigned to the "Hartwell project". After four months of work on Hartwell, plaintiff was informed that his efforts were no longer needed on that project and that no other assignment had been located for him. The company intended placing him in "holding

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status" effective April 30, 1993. Holding status meant that for a period of three months plaintiff could not be paid, but would retain some benefits. If the company had not have found a new assignment for him by the end of that period, he would be laid off. Rather than accept holding status, plaintiff informed defendant that he would retire effective April 23, 1993.

Plaintiff filed a complaint with the EEOC on March 15, 1994, and received his notice of right to sue based on the Age Discrimination in Employment Act ("ADEA") on November 24, 1995. Plaintiff filed his complaint to this action on February 20, 1996, alleging that defendant discriminated against him on the bases of his age. He is proceeding without an attorney. Defendant has now moved for summary judgement.

I

Summary Judgement is a method for the prompt disposition for an action in which there is no genuine issue of material fact. FRCP 56(c) provides for the granting of summary judgement where the moving party is entitled of judgement as a matter of law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Once the moving party has met that burden by presenting evidence which, if uncontradicted, would entitled it to a direct verdict at trial, FRCP 56(e) shifts to the nonmoving party the burden of presenting specific facts showing that such contradiction is possible. British Airways Bd v Boeing Co, 585 F2d 946, 950-52 (9th Cir 1978).

A party opposing summary judgment may not rest upon the mere allegations of his pleadings. Rather, responses, either by affidavits or as otherwise provided in the rule, must set forth specific facts, showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the nonmoving party's position will not suffice. There must be enough of a showing that the jury could reasonable find for the non-moving party. Anderson v Liberty Lobby Inc, 477 US 242 (1986).

The question in summary judgment motions is whether reasonable minds could defer as to the import of the evidence. Eisenberg v Insurance Co. of North America, 815 F2d 1285, 1288 (9th Cir 1987). "If the evidence is merely colorable * * * or is not significantly probative, summary judgement may be granted." Id at 1288. The non-moving party's evidence is to be taken as true and all inferences have to be drawn in the light most favorable to the nonmoving party. Eisenberg, 815 F2d at 1289.

II

A

The Ninth Circuit has summarized the standards for evaluating motions for summary judgement in employment discrimination cases as follows:

> A plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.
>
> The requisite degree of proof necessary to establish a prima facie case for case for Title VII and

> ADEA claims on summary judgement is minimal and does not even need to raise to the level of a preponderance of the evidence. The plaintiff need only offer evidence which gives rise to an inference of unlawful discrimination. The amount of evidence that must be produced in order to create a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.

Wallis v J.R. Simplot, 26 F3d 885, 889 (9th Cir 1994) (citations & internal quotations omitted). In order to establish a prima facie case under the ADEA, plaintiff must show he was

(1) a member of the protected class (age 40-70);
(2) perform his job in a satisfactory manner
(3) discharged;
(4) replaced by a substantial younger employee with equal or inferior qualification.

Id at 891. Defendant contests neither that plaintiff is a member of the protected class nor that he was performing his job in a unsatisfactory manner. The motion for summary judgement rests instead on the latter two requirements.

B

Defendant first asserts that plaintiff was not discharged; it contents that he resigned. The parties do not contest that plaintiff chose to retire and not terminated, but the issue does not end there. Although he apparently unfamiliar with the term, plaintiff essential claims that he was constructively discharged. Plaintiff asserts that he retired because he was not in a position to live without an income during three months of "holding status". Furthermore, he claims that he would have been laid off at the end of that period in any case. Defendants own evidence regarding the reduction in staff at the

Gaithersburg office suggest that plaintiff's perception had a basis in fact. The declaration of Dianne Adams, the employee relations administrator in the Gaithersburg office, indicates that the total workforce in that office steadily declined from 2211 at the end of 1992, to 1,545 at the end of 1993 and 670 by June 30, 1996. Adams' Decl at #8. The number of engineers in plaintiffs job category dropped from 30-24 in 1993 and to only 9 by mid 1996. Id. Given the dramatic reduction in the Gaithersburg office staff, it seems unlikely that many workers were recalled once they were on holding status. Plaintiffs argument can be construed, therefore, as a claim that his retirement was forced by the company.

In order to establish a constructive discharge, a plaintiff must show that "a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions". Watson v Nationwide Ins Co ,823 F2d 360,361 9th Cir 1987) (citations and internal quotations omitted). That determination is "normally a factual question left to the trier of fact". Id. In most cases, a single incident is insufficient as a matter of law to sustain a finding of constructive discharge. Id. Where the company does something as drastic as reducing the employee's salary to zero, however, this court is unwilling to say that a reasonable jury could not find such action to constitute constructive discharge.

C

Defendant next asserts that plaintiff was not replaced by a younger person of equal or lesser qualification. To the

extent plaintiff contests this point, his allegations concerns a younger designer named Kenneth Shaffer. Defendant has produced evidence in the form of declarations and excerpt from the deposition of the plaintiff which demonstrates that Shaffer did not replace plaintiff. Shaffer worked on Hartwell prior to plaintiff's assignment to that project and continued after plaintiff left the company. Shaffer held the lead designer position on that project and plaintiff reported to him. Plaintiff has produced no evidence showing that Shaffer replaced him in his duties.

Although plaintiff cannot show that he was replaced by a younger employee, that failure does not necessary doom his claim. In cases involving a reduction in workforce, as here, a plaintiff may employ "circumstantial, statistical or direct evidence" to show that "the discharge occurred under circumstances given rise to an inference of age discrimination. Wallis, 26 F3d at 891. "Such an inference can be established by showing the employer had a continuing need for his skills and services in that his various duties were still being performed". Id. (citations and internal quotations omitted).

Plaintiff focuses much of his argument on the notion that the circumstances surrounding the decision to place him on holding status give rise to an inference of age discrimination. He is particularly concerned that the company continued to employ Shaffer despite plaintiff's believe that the younger man is incompetent. Plaintiff also asserts that his own low performance rating can only be explained by virtue of age discrimination

because he received consistently positive performance reviews and held positions of significant responsibilities.

The evidence supplied by the defendant demonstrates that he continues to employ electrical designers of plaintiff's grade. From this it may be inferred that it has a continuing need for those skills and services. Furthermore, the evidence indicates that Shaffer performed substantial similar duties to plaintiff. In light of his experience in this field and his first-hand knowledge of Shaffer's work, plaintiff would be competent to testify as to the quality of the younger man's work. He testified at his deposition that Shaffer's incompetence. He submitted performance evaluations for himself that were positive. Shaffer was retained while plaintiff was offered holding status. Given that the evidentiary standard for a prima facie case of employment discrimination is only "minimal", Id at 889, the court cannot say that plaintiffs claim do not give rise to an inference of discrimination. For this reason, the court finds that plaintiff has made out a prima facie case of age discrimination.

D

Once the plaintiff has established a prima facie case of employment discrimination, the defendant must come forward with a legitimate reason for discharging the employee. Id. The plaintiff must at that point show that the ostensible reason for discharge was merely a pretext for discriminatory conduct. Id. The parties have not adequately briefed this aspect of the test established by the Ninth Circuit. For this reason, the court

reserves decision on the matter until such time as these additional issues have been addressed.

IT IS SO ORDERED

"s/ V R Walker"
VAUGHN R. WALKER
United States District Judge

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The pleading indicate that plaintiff returned from a short-term disability leave in October 1992 and was assigned to the "Masspower project". In January 1993, plaintiff was reassigned to the "Hartwell project". After four months of work on Hartwell, plaintiff was informed that his efforts were no longer needed on that project and that no other assignment has been located for him. On or about April 2, 1993, plaintiff received a letter from V.R. Marathe informing him that the defendant intended to place him in "holding status" effective April 30, 1993. Holding status meant

that for a period of 3 months plaintiff will not be paid, but would retain some benefits. If the company had not found a new assignment for him by the end of that period, he will be laid off. Rather than accept holding status, plaintiff informed defendant that he would retire effective April 23, 1993.

Plaintiff filed a complaint with the EEOC on March 15, 1994, and received his notice of right to sue based on the age Discrimination in Employment Act ("ADEA") on November 24, 1995. Plaintiff filed his complaint in this action on February 20, 1996, alleging that defendant discriminated against him on the basis of his age. He is proceeding without an attorney.

In an order issued on Dec 11, 1996, the court found that plaintiff had met his initial burden of establishing a triable issue of fact as to a prima facie case of employment discrimination. Defendant now moves for summary judgement on the ground that he has proffered legitimate, non-discriminatory reasons for plaintiff's termination or resignation and that plaintiff can not show that defendant's proffered reasons are simply pretexts for discrimination. In response, plaintiff submitted a FRCP 56(f) affidavit specifying the information he allegedly needs to show that the reasons given by defendant are in fact pretexts for discrimination.

For the following reasons, defendant's motion for summary judgement is GRANTED.

I

Summary Judgement is a method for the prompt disposition of an action of which there is no genuine issue of material fact.

FRCP 56(c) provides for the granting of summary judgement where the moving party is entitled to judgement as a matter of law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Cellotex Corp. v Catrett, 477 US 317, 322-23 (1986). Once the moving party has met that burden by presenting evidence, which, if uncontradicted, would entitle it to a direct verdict a trial, FRCP 56(e) shifts to the non-moving party the burden of presenting specific facts showing that such contradiction is possible. British Airways v Boeing Corp, 585 F2d 946, 950-52 (9th Cir 1978).

A party opposing summary judgement may not rest upon the mere allegations or denials of his pleading. Rather, responses, either by affidavits or as otherwise provided in the rule, must set-forth specific facts showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the non-moving party's position will not suffice. There must be enough of a showing that the jury could reasonable find for the nonmoving party. Anderson v Liberty Lobby Inc, 477 US 242 (1986).

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II

In the Ninth Circuit, the criteria applied to a Title VII discrimination claim also apply to claims arising under the ADEA. Palmer v United States, 794 F2d 534, 536 (9th Cir 1986). See also Ritter v Hughes Aircraft Co, 58 F3d 454, 456 (9th Cir 1995). In addition, this Circuit has summarized the standards for evaluating motions for summary judgement in employment discrimination cases as follows:

> A plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis v J.R. Simplot, 26 F3d 885, 889 (9th Cir 1994) (citations & internal quotations omitted). It should also be noted that "When evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case * * *". Id at 889.

Since the court has already found the plaintiff has made out a prima facie case under this framework, defendant summary judgement motion turns on whether or not defendant has offered a legitimate, non-discriminatory reason for plaintiff's departure and whether plaintiff can show that those reasons are merely pretext for another discriminatory motive.

A

Defendant argues that plaintiff was laid-off or resigned because off downsizing in the field of engineering services.

Specifically, defendant maintains that when plaintiff finished the work assigned to him, there was simple no other work for him to do, either on the Hartwell project or any other project defendant was responsible for at the time.

It is legitimate and non-discriminatory for a company to downsize in response to economic changes. Id at 892. Given that Defendant has met his burden, plaintiff must now show that downsizing was a mere pretext for age discrimination in order for his ADEA claim to survive.

B

Plaintiff has alleged no facts to establish that defendant's downsizing was a pretext for discrimination. Instead, he has filed a FRCP 56(f) affidavit which sets out additional discovery he would need in order to prove that downsizing was pretextual.

"A rule 56(f) motion must show how additional discovery would preclude summary judgement and why a party can not immediately provide 'specific facts' demonstrating a genuine issue of material fact". United States v one 1985 Mercedes, 917 F2d 415, 418 (9th Cir 1990) (quoting MacKey v Pioneer National Bank, 867 F2d 520, 524 (9th Cir 1989). Moreover, the burden of showing that the evidence does in fact exists and is not the product of speculation rest with the party opposing summary judgement. Terrell v Brewer, 935 F2d 1015, 1017 (9th Cir 1991).

Plaintiff states his need for further discovery with the appropriate level of specificity. None of the discovery he requests however, will produce the evidence necessary to establish

that the defendant's downsizing explanation is pretext for discrimination.

Plaintiff ask the court to allow him to discover several different items relating to the Hartwell project and its personnel as well as the names & addresses of those persons responsible for evaluating his performance. This information has no bearings on the issue at hand.

First, plaintiff merely speculates that obtaining a list of people who worked on the Hartwell project after his departure will uncover the fact that entirely new personnel replaced him; he offers the court no other evidence that such outsider exists.

Second, if plaintiff wishes to use discovery to prove that other persons within Defendant took over his duties there, this contention would only "reinforce (defendant's) explanation for termination: the company was decentralizing (his) function and requiring other employees to assume his duties". Wallis, 26 f3D AT 892.

Lastly, designs of the Hartwell project, the competency of his supervisor and his own performance rating are all irrelevant. This is a suit based on employment discrimination, not on whether defendant built the best project or hired competed supervisors.

In short, the discovery which plaintiff seeks does not point to any genuine issue of material fact. Hence, he has failed

to meet his burden of proving that the downsizing was pretextual and defendant's motion for summary judgement is GRANTED.

IT IS SO ORDERED.

"S/ V R Walker
VAUGHN R. WALKER
United States District Judge.